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In the Supreme Court of the United States

OCTOBER TERM, 1979

ENCYCLOPAEDIA BRITANNICA, INC. AND BRITANNICA HOME LIBRARY SERVICES, INC., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 605 F. 2d 964. The order and opinions of the Federal Trade Commission (Pet. App. A26-A183) are reported at 87 F.T.C. 421.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1979 (Pet. App. A1). The petition for a writ of certiorari was filed on October 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the pattern of deliberate and repeated deceptive practices found by the Federal Trade Commis-

sion on this record warranted the Commission's conclusion that requiring petitioners to make certain disclosures in their advertisements and at-home solicitations is necessary to remedy those practices and prevent their recurrence.

STATEMENT

1. Petitioners publish, sell, and distribute various textbooks, encyclopedias, reference and educational materials, training courses and other similar works and services. Petitioners primarily solicit direct sales to customers in their homes on a door-to-door basis. In order to gain entry into a potential customer's home and to circumvent aversion to door-to-door sales solicitations, petitioners trained and directed their sales people to misrepresent the actual purpose of their visit.[1] For example, petitioners told their sales people to deny that they were in fact salespersons and to state that they were conducting an advertising research survey. Petitioners provided their employees with bogus survey questionnaires and a spurious letter from the advertising director to facilitate this deception. As soon as the potential customer had filled in the "survey," the salespersons were instructed to begin their sales pitch. Thereafter, the completed surveys were never used or analyzed (Pet. App. A2, A28-A30, A59-A61, A82, A86, A91, A114-A115, A145-A147).

Moreover, petitioners used various alleged contests and other misleading promotions as a means of obtaining leads for their salespersons. Thus, petitioners' magazine and direct mail advertisements offered free Britannica merchandise, gift certificates, and informational brochures for those responding. None of these

[1]Petitioners also engaged in various deceptive practices in recruiting their sales people (Pet. App. A26, A61-A81).

advertisements disclosed that persons who responded would be contacted directly by salespersons. Indeed, the advertisements indicated that the publisher would send the free materials by mail. Likewise, the purported contest entry cards suggested only that those who sent in a card would have a chance to win one of petitioners' publications with "no obligation" and that "winners will be notified by telephone." In fact, however, petitioners' salespersons directly contacted those who sent in cards, falsely stated that they had come to the house solely to deliver a free booklet or other prize, and then attempted to sell petitioners' products to the "contest" entrant (Pet. App. A35-A36, A110-A112, A146).

The sales presentation itself was also designed to deceive. Petitioners instructed their representatives to sell merchandise on the "cooperative plan." Petitioners' sales persons would thereby lead customers to believe that they were obtaining certain extra products free as a result of their limited cooperation, that the total cost of the cooperative plan was substantially less than the retail price, and that the offer was open for a limited time only. All of these representations were false and misleading. Similarly, petitioners' sales and advertising materials regarding their "Library Research Service" and "Continuity Book Programs" were also deliberately deceptive. In addition, petitioners trained their sales persons to mislead the customer about his cancellation rights. Finally, petitioners' debt collection procedures were also characterized by numerous false, misleading and deceptive statements (Pet. App. A26, A91-A131).

2. After evidentiary hearings on an administrative complaint, the Federal Trade Commission found (Pet. App. A26-A37) that petitioners' sales operations were deliberately and thoroughly permeated with deceptive, misleading and unfair practices, in violation of Section 5

of the Federal Trade Commission Act, 15 U.S.C. 45.[2] In particular, the Commission focused on petitioners' in-home solicitation methods, observing that petitioners' "sales representatives have been trained to disguise the main purpose of the visit in a way which deceives the consumer as to the real reason the representative seeks admittance to the home—to make a sale" (Pet. App. A28). The Commission concluded that "[t]he company-prescribed disguise techniques necessitate * * * an order provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman and of the true purpose of gaining entry into the home" (*id.* at A29-A30). Accordingly, the Commission ordered that before seeking admission to a home or business to solicit a sale, petitioners' representatives present a three-by-five card setting forth the name of the salesperson, the name of the corporation, the term "Encyclopedia [or other applicable product] Sales Representative," and the statement "The purpose of this representative's call is to solicit the sale of encyclopedias [or other applicable product]" (*id.* at A40-A41).[3]

Similarly, the Commission held that affirmative disclosures were necessary to remedy petitioners' deceptive advertisement and promotional contest procedures. The Commission therefore directed petitioners to cease and desist from disseminating advertising or promotional

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[2]With minor exceptions, the Commission adopted (Pet. App. A37) the extensive findings and conclusions of the administrative law judge (*id.* at A52-A169).

[3]These admonitions must be in 10-point bold face type and the salesperson must give the prospective customer an opportunity to read the card (Pet. App. A41). The administrative law judge would have required a statement on the card advising the consumer to keep the card as part of his records (Pet. App. A173). The Commission deleted this statement as unnecessary (*id.* at A30-A31).

materials inviting response or contest participation unless such materials contained the following notice in 10-point bold face type: "NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALES PERSON FOR THE PURPOSE OF SELLING [insert name of applicable product]" (Pet. App. A40). The Commission further ordered that a similar notice appear on any return card or coupon accompanying the promotional material (*ibid.*).[4]

3. Petitioners sought review in the court of appeals, challenging only certain remedial provisions of the Commission's order (Pet. App. A2). The court of appeals affirmed in an extensive opinion and enforced the Commission's order (Pet. App. A1-A25). Observing that the Commission had fully considered other alternatives (*id.* at A11-A12), the court held that the affirmative disclosures required by the Commission are "reasonably related to [petitioners'] deceptive practices" (*id.* at A10).[5] The court further concluded that the Commission's order did not violate petitioners' First Amendment rights because the remedies ordered by the Commission are no "broader than is necessary to prevent future deception or

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[4]The Commission's order (Pet. App. A37-A51) also prohibits petitioners from continuing to engage in the broad range of deceptive and misleading behavior detailed above. Thus, petitioners' representatives may not state that they are not salespersons, that they are conducting a marketing survey, or that they are calling on a prospective customer for the purpose of delivering a prize, free booklet, or similar item (Pet. App. A41). Petitioners do not challenge the prohibitive provisions of the order (Pet. 4).

[5]The court of appeals also rejected petitioners' claims that the Commission's proceeding against Britannica was discriminatory (see Pet. App. A15-A17) and that the Commission had improperly relied on an extra-record Commission policy study (*id.* at A17-A21). These issues are not before the Court.

correct past deception" (*id.* at A13) and are "the least restrictive alternative which will adequately further the legitimate governmental interest of the prevention of deception" (*id.* at A15).[6]

ARGUMENT

Petitioners do not contest the findings of the Commission regarding their purposeful and widespread sales deceptions. Moreover, they acknowledge that, consistent with the First Amendment, the Commission may require a commercial enterprise to make affirmative disclosures "necessary to prevent deception" (Pet. 13, 15). Thus, their central claim is that the specific affirmative disclosures ordered in this case violate their First Amendment rights because the remedies selected by the Commission are excessive. The court of appeals correctly rejected this limited and fact-specific claim in an extensive opinion. That decision does not conflict with any decision of this Court or any court of appeals, and further review is unwarranted.

1. The First Amendment, of course, affords commercial speech a limited measure of protection. See, *e.g.*, *Friedman* v. *Rogers*, 440 U.S. 1, 9-11 & n.9 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383 (1977). But such speech occupies a clearly "subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 456;

[6]Judge Wood dissented, stating that the Commission did not adequately explain its affirmative disclosure requirements, which in any event were too severe (A22-A25).

see *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10-11 n.9.[7] It is thus well settled that the government has broad power to regulate and to restrict potentially false, unlawful, deceptive, or misleading commercial speech, especially in the context of in-person solicitations. See, *e.g.*, *Schaumburg* v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980), slip op. 17 n.11; *Friedman* v. *Rogers*, *supra*, 440 U.S. at 9-10; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 455-467; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-699 (1978); *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 383-384; *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 & n.31 (1976); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 & n.24 (1976).[8]

Furthermore, there is no doubt that the Commission may constitutionally "require that a commercial message appear in such a form . . . as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10, 16, quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n.24. See, *e.g.*, *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 383-384; *Porter & Dietsch, Inc.* v. *FTC*, 605 F. 2d 294

[7]For example, overbreadth analysis is not applicable to commercial speech regulation. See *Schaumburg* v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980), slip op. 12 n.7, 14; *Friedman* v. *Rogers*, *supra*, 440 U.S. at 11 n.9; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 462 n.20; *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 380-381.

[8]As the Court pointed out in *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.

(7th Cir. 1979), petition for cert. pending, No. 79-731; *National Comm'n on Egg Nutrition* v. *FTC*, 570 F. 2d 157, 160-162 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Warner-Lambert Co.* v. *FTC*, 562 F. 2d 749, 758-763 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).[9] In sum, so long as "the relief represents a reasonable method of eliminating * * * illegal conduct," an affirmative disclosure requirement does not run afoul of the First Amendment. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 698. See *id.* at 697; *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 384; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n.24; *Porter & Dietsch, Inc.* v. *FTC*, *supra*, 605 F. 2d at 304-308.

[9]Although petitioners concede that an affirmative disclosure requirement is constitutional in at least some circumstances (Pet. 13, 15), they nevertheless rely on *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, for the proposition that the Commission's power to impose prophylactic rules and affirmative disclosure requirements presents an unsettled question. Petitioners fail to cite or discuss this Court's more recent decisions in *Friedman* v. *Rogers*, *supra*, and *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, and make only a passing reference to *National Society of Professional Engineers*, *supra*. See Pet. 16-17. In those cases, the Court concluded that the government may constitutionally prohibit certain kinds of commercial speech altogether or may otherwise "require that a commercial message appear in such a form . . . as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10, 16. Likewise, every court of appeals that has considered the question has concluded that the First Amendment does not bar the Commission from imposing reasonable affirmative disclosure requirements in appropriate circumstances. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*.

In light of the pervasive, deliberate, and persistent nature of petitioners' deceptive sales practices,[10] the court of appeals correctly sustained the Commission's order in this case. Petitioners intentionally deceived customers with respect to when and whether they would be confronted in their homes by encyclopedia salespersons. In particular, petitioners used "contests" and other promotional devices to mislead prospective customers. They also persistently and pervasively indoctrinated their salespersons to lie about the purpose of their visit and the fact that they were salespersons and to use various unfair and deceptive practices. Accordingly and in direct response to those egregious deceptions, the Commission reasonably required petitioners (1) to disclose in their future advertising that persons who respond will be

[10]The Commission found—and petitioners do not contest—that petitioners deliberately employed numerous deceptive, misleading and false sales techniques. Moreover, the kinds of deceptions at issue here have long been condemned and have been a persistent problem in the door-to-door retailing of encyclopedias. See, *e.g.*, *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937); *Grolier, Inc.*, 91 F.T.C. 315, 476-501 (1978), remanded on other grounds, No. 78-2159 (9th Cir. Jan. 24, 1980); *The Crowell-Collier Publishing Co.*, 70 F.T.C. 977, 1010-1013, 1021-1026 (1966); *Basic Books, Inc.*, 56 F.T.C. 69, 79-80 (1959); *National Educators, Inc.*, 49 F.T.C. 1358, 1362-1363 (1953); *Nat'l Surveys and Educational Development Co.*, 47 F.T.C. 888, 894-895 (1951); *Americana Corp.*, 45 F.T.C. 32, 43-44 (1948); *General Surveys, Inc.*, 34 F.T.C. 1157, 1162-1163 (1942); *Holst Publishing Co.*, 24 F.T.C. 404, 414-415 (1937); *World Library Guild, Inc.*, 23 F.T.C. 598, 604-606 (1936); *American Academic Research Society*, 17 F.T.C. 419, 420-421 (1933); *Consolidated Book Publishers, Inc.* 14 F.T.C. 13, 18-19 (1930). Indeed, some of the deceptive practices that gave rise to this case—such as misrepresentations about special, limited discount offers based on a combination plan—have been the subject of previous Commission proceedings against petitioners. See *Encyclopaedia Britannica, Inc.*, 59 F.T.C. 24 (1961); *Encyclopaedia Britannica, Inc.*, 48 F.T.C. 1416 (1952). Rather than complying with the cease and desist orders issued in those cases, petitioners have persisted in and expanded their deceptive sales practices.

contacted by petitioners' salespersons and (2) to apprise prospective customers of the true purpose and identity of petitioners' salespersons. In short, based on the specific facts of this case, the Commission has reasonably "require[d] that [petitioners'] commercial message[s] appear in such a form * * * as [is] necessary to prevent [their] being deceptive." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n. 24. The Commission's order therefore does not abridge petitioners' First Amendment rights.[11] See, *e.g.*,

[11]Petitioners erroneously claim (Pet. 2, 9, 13-19) that the Commission has adopted a general policy of requiring affirmative disclosures in all deceptive practice cases, as an extension of the so-called "fencing-in" doctrine. See, *e.g.*, *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957). The Commission's test in all cases is what form of order will be most effective to " 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance' * * *. Whether a 'broad' or 'narrow' order will be most effective depends, therefore, on the particular circumstances and needs of the case." *All-Luminum Products, Inc.*, 63 F.T.C. 1268, 1279 (1963). In proceedings involving concealment of relevant commercial information, the most obvious and effective remedy has often proved to be affirmative disclosures. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*; *P.F. Collier & Son Corp.* v. *FTC*, 427 F. 2d 261 (6th Cir.), cert. denied, 400 U.S. 926 (1970); *J.B. Williams Co.* v. *FTC*, 381 F. 2d 884 (6th Cir. 1967); *Ward Laboratories, Inc.* v. *FTC*, 276 F. 2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960); *Kerran* v. *FTC*, 265 F. 2d 246 (10th Cir. 1959). Such a requirement is particularly warranted here given petitioners' history of deliberate, repeated, and intrusive deceptions. See also note 10, *supra*.

Likewise, there is no merit to petitioners' contention (Pet. 27-29) that the order in this case exceeds the Commission's statutory authority. As the cases cited above demonstrate and as the court of appeals concluded (Pet. App. A9-A11), this order falls well within the Commission's discretion. See also *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). That petitioners' sales may suffer as a result of the order merely reflects the pervasive nature of the deceptive techniques long practiced by petitioners and the materiality of the disclosures ordered by the Commission.

Friedman v. *Rogers*, *supra* (complete ban on all trade names); *Ohralik* v. *Ohio State Bar Ass'n*, *supra* (state may totally eliminate lawyers' in-person solicitations); *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *National Comm'n on Egg Nutrition* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*.

2. Petitioners nonetheless claim (Pet. 19-26) that the court of appeals applied the wrong standard in reviewing the Commission's order in this case. Citing *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), petitioners suggest that the normal deference due the Commission with regard to its choice of remedies is inapplicable in the First Amendment—commercial speech context.[12] Instead, petitioners urge (Pet. 15, 20-23) that heightened judicial scrutiny, apparently in the nature of a least restrictive alternative test, is appropriate in this case. According to petitioners, if that test were applied to the order in this case, the court of appeals would have rejected the Commission's order. These claims are both legally and factually without merit.

In *National Society of Professional Engineers* v. *United States*, *supra*, this Court addressed the question

[12]Petitioners also argue (Pet. 24-26) that whatever is the standard in other situations, a special standard of review governs this case because Britannica is "a publisher engaged in the distribution of its publications." The cases and principles relied on by petitioners are inapposite, however, since the Commission has neither limited petitioners' publishing activities nor even indirectly affected the content of petitioners' publications. "The fact that the publisher handles news while others handle food does not * * * afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press* v. *United States*, 326 U.S. 1, 7 (1945). See also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

whether a district court's remedial order limiting commercial speech violated the First Amendment. The Court made clear that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." 435 U.S. at 698. Accordingly, insofar as the Third Circuit adopted a least restrictive alternative analysis or other more searching standard in *Beneficial Corp.*, its approach has been rejected by this Court. See also *Friedman* v. *Rogers*, *supra*, 440 U.S. at 12 n.11 ("there is no First Amendment rule * * * requiring [the Commission] to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication"); *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457 (limitation of in-person solicitation subject to "lower[ ] * * * level of * * * judicial scrutiny"). Cf. *Brown* v. *Glines*, No. 78-1006 (Jan. 21, 1980), slip op. 7.

In any event, the court of appeals expressly applied the more stringent *Beneficial Corp.* test to the Commission order in this case (see Pet. App. A13) and held that the Commission's remedies are "the least restrictive alternative which will adequately further the legitimate governmental interest of the prevention of deception" (*id.* at A15).[13] That conclusion is amply supported by the

[13]Petitioners incorrectly suggest (Pet. 22) a conflict between this decision and the Third Circuit's decision in *Beneficial Corp.* by pointing to the court of appeals' discussion of petitioners' statutory claim (Pet. App. A9-A11). The court of appeals' careful discussion of petitioners' First Amendment claim unequivocally applies the same standard that was adopted by the court of appeals in *Beneficial Corp.* See Pet. App. A12-A15. Indeed, the Seventh Circuit previously approved the *Beneficial Corp.* standard in *National Comm'n on Egg Nutrition* v. *FTC*, *supra*, 570 F. 2d at 164.

record. The breadth of petitioners' deliberate deceptions belies their suggestion that a cease and desist order is a sufficient remedy. Indeed, the cease and desist orders in prior cases against petitioners covered at least some of the sales deceptions that were found by the Commission in this case. See note 8, *supra*. Given the inherent potential for deception in the context of in-person solicitations (*Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457-458) and petitioners' longstanding policy of deceiving and lying to potential customers as part of their in-person sales presentations, the Commission was warranted in concluding that a printed disclosure truthfully identifying the salesperson and the purpose of his visit was necessary to terminate petitioners' illegal conduct. See Pet. App. A15, A157-A158, A160-A161.[14] Similarly, the Commission properly imposed a limited disclosure requirement on petitioners' future advertising so as to ensure informed decision-making by potential customers. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*. Further review of these fact-specifc questions is unwarranted.

[14]Particularly in light of petitioners' prior bad faith and deliberate deceptions, there is little likelihood that the requirement of an oral disclosure would be an effective limitation on petitioner's unlawful sales practices. To the contrary, because deceiving a potential customer long enough to get in the door is a key to petitioners' sales strategy (Pet. 8 n.*; Pet. App. A160), there is every incentive to mislead and disguise the salesperson's identity and purpose. See *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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